

DEP VICTORIOUS BEFORE THE STATE SUPREME COURT:
MELLON TREE-CUTTING SUBJECT TO CEPA RELIEF

By Assistant Attorney General Janet P. Brooks

Since December 1999 when Timothy Mellon, sole member of Goodspeed Airport, LLC set in motion the clear cutting of 2.5 acres of floodplain forest along the banks of the Connecticut River in East Haddam, directly south of the Airport and north of Chapman's Pond, Mr. Mellon learned that town and state regulators carry through with their missions to protect natural resources from illegal activities. The trees were on land owned by the East Haddam Land Trust and The Nature Conservancy. The forest was part of an ecosystem designated as a wetlands complex of international significance. Prior to the state initiating litigation state and local parties interested in a resolution of the assault conducted informal negotiations. When no fruitful resolution was reached, the Attorney General's Office representing the Department of Environmental Protection (DEP) filed a lawsuit based on violations of the Connecticut Environmental Protection Act (CEPA): that the clear cutting of the forest constituted unreasonable impairment and destruction of the forest as well as unreasonable impairment to the wetlands on which the forest was located. The East Haddam Inland Wetlands & Watercourses Agency had already initiated suit under the state Inland Wetlands & Watercourses Act (Wetlands Act) alleging the clear cutting was regulated by the Wetlands Act and the cutting was performed without a local wetlands permit. The Attorney General's Office could have crafted a suit based on the Wetlands Act, as any person is authorized to bring a suit alleging wetlands violation. The decision to rely on CEPA was fortunate, as the trial court ultimately issued its order for relief solely under CEPA.

The trial was conducted as a team effort among the attorneys for the DEP, the town wetlands commission, the East Haddam Land Trust and The Nature Conservancy. The team shared expert witnesses and coordinated efforts putting on the case. While the case involved issues such as federal aviation law and private property rights, this article focuses on the environmental aspect of the clear cutting.

The Attorney General's Office separated the harm done into two categories: 1) to wetlands and watercourses, and 2) to the forest. To prove the CEPA violation of unreasonable impairment of the wetlands and watercourses, under state Supreme Court precedent, proof needed to be offered that the clear cutting was a violation of the Wetlands Act. To so establish we had to prove that clear cutting is a regulated act. DEP offered its own soil scientist who identified key terms in the definitions of the Wetlands Act: the "removal or deposition of material" or "alteration" of a wetlands is a "regulated activity." In addition, "material" is defined as "any substance . . . organic or inorganic . . ." The trial court found clear cutting to be a regulated activity. The Supreme Court affirmed that ruling, stating: "If the removal of all vegetation growing in a wetlands area was not intended to be a regulated activity, we would be hard pressed to imagine what type of material the legislature had in mind in enacting § 22a-38 (13) [of the General Statutes.]" Ventres v. Goodspeed Airport, LLC, 275 Conn. 105, 138 (2005). This ruling affirmed what the DEP and wetlands commissions have believed since the inception of the Act: clear cutting, except for the expansion of agricultural crop land, is a regulated activity.

The Supreme Court also dismissed out of hand that its decision in AvalonBay Communities, Inc. v. Inland Wetlands Commission, 266 Conn. 150 (2003) controls this case. In AvalonBay the Supreme Court held that, in a matter arising from the concern of salamander habitat outside the regulated upland review area, wildlife does not come within the jurisdiction of the Wetlands Act. In contrast, the court held, this clear cutting of vegetation within wetlands can be regulated even if it does not harm the wetlands soils. The court admitted that the trial court found harm, scouring and erosion, to the wetlands by the elimination of the trees which acted as a floodbrake. The use of expert testimony was interwoven with the legal argument made by counsel that as a matter of fact and law clear cutting is a regulated activity.

The trial court dismissed the DEP's claim alleging unreasonable impairment to the wetlands. The Supreme Court reversed that aspect of the decision and sent the case back to the trial court to consider the granting of further relief.

The trial court found that DEP had proved unreasonable destruction of forest, the second aspect to the CEPA claim. The trial court found that the airport had an easement to trim several trees a year for airport safety, but that clear cutting all vegetation to the ground was unreasonable. The Supreme Court upheld this ruling.

Ultimately the trial court awarded relief at the site under CEPA and not the Wetlands Act. The court found that the relations were strained between the neighboring property owners and any requirement for Mellon to enter onto property, such as to plant trees, could be problematic. It turned to an alternative available by law only when the Attorney General brings a CEPA case: issuance of a supplemental environmental project. In this case, the trial court, although guided by a proposal from the Attorney General's Office regarding invasive plant species, crafted a plan on its own, that Mellon and the airport be responsible to pay \$50,000 to DEP for a government-funded research project at the site. The trial court expects DEP to identify one of the affected landowners, if possible, to be the recipient of the funds, to study and implement many of the aspects of restoration that the witnesses for the DEP, the property owners and the local wetlands agency testified in support of. The civil penalties are required by law to be used for restoration. In sum, the trial court ordered the payment of \$67,500 with the expectation that the amount would be used to remediate the harm. Such creative relief was not available under the Wetlands Act. In addition, Mellon may be assessed the attorney's fees for all prevailing parties under the Wetlands Act and CEPA. The entire "team" reserved their individual rights to petition for attorney'

The Supreme Court affirmed the trial court's holding that Timothy Mellon was personally liable for the violations under the Wetlands Act and CEPA. His liability is grounded in his participation, i.e., the management of the clear cutting. The fact that the Goodspeed Airport was legally organized as a limited liability corporation (LLC) under the state laws doesn't shield a member of the LLC from the legal repercussions of conduct in which he participated. By this decision the Supreme Court extended the "participation doctrine" to environmental violations.

The Supreme Court upheld the wetlands commission's successful efforts to cast Mellon's clear cutting as a violation of the Wetlands Act. The trial court found that the wetlands agency proved a violation of the Wetlands Act, and ordered that Mellon and the airport engage in no future regulated conduct without a permit. It also assessed a civil penalty (\$500/day) for a 35 day period which began the day of the clear cutting and ended with the issuance of a cease and desist order prohibiting regulated activities without a wetlands permit. No hearing was held as is required. (Mellon objected to wetlands commissioners participating in the hearing who were also members of the affected property owner, the East Haddam Land Trust.) The Supreme Court upheld the 35 day limit on penalties, although the legal reasoning is not so clear to predict penalties in future cases. It appears that the commission's issuance of an administrative order to cease, desist or restore without holding the hearing contributed to this outcome. The Supreme Court did state, however, if a commission wants penalties for the lack of restoration, it must complete the hearing, and affirm or revise the order, and then go to court to seek penalties or enforcement of the order.

Lessons to be learned:

1. To receive a trial court decision full of facts in your favor, work hand-in-hand with experts who can describe the harm from as many perspectives as the facts support. (In this case that included a soil scientist, botanist and geologist.)
2. In addition to the legal entity that undertook the illegal activity (corporation, Limited Liability Corporation, etc.) consider bringing the lawsuit or administrative order against corporate officer or LLC member who participated in the illegal conduct.
3. When your commission issues an order, hold the hearing and take action to revoke, affirm or revise the order. If your commission can not hold the hearing, take officials step to revoke the order.
4. Work in tandem with all parties whose interests are allied.

The Attorney General's Office was represented by Assistant Attorneys General Janet Brooks and David Wrinn.

To access the Supreme Court decisions in this case electronically:

1. go to the judicial website at: www.jud.state.ct.us/opinions.htm
2. click on "Archives"
3. click on "Supreme Court archives"
4. click on "2005"
5. scroll down to "Published in Connecticut Law Journal – 8/30/05"
6. click on SC 17280 for Ventres v. Goodspeed Airport, LLC (East Haddam Inland Wetlands Commission's case)
7. click on SC 17281 for Rocque v. Mellon (DEP case)